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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

RYAN P. ANGLE, Plaintiff and Appellant, v. JAMES BARNETT, Defendant and Respondent.	2d Civil No. B215572 (Super. Ct. No. CV 070529) (San Luis Obispo County)

Ryan P. Angle appeals from the judgment entered in favor of respondent, James Barnett, following an order granting his motion for summary adjudication. Appellant contends that triable issues of fact exist with respect to his bystander claim for negligent infliction of emotional distress. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant's wife drove into Pismo Beach with their children to meet appellant for lunch. She parked on Price Street, and the children got out of her car.

Respondent was driving down Price Street at about 15 miles per hour. He struck and injured appellant's four-year-old son, Connor. Appellant's wife testified that she realized Connor had been struck when she saw his head hit the ground.

Appellant had parked in the next block. He was walking toward his wife's parked car when he heard a noise. He was 40 or 50 yards away and he saw his wife's head above some cars. He may have heard brakes, "and then somebody yelling like, 'He's been hit,' or something, and - - and that's when I took off running." He ran "to the area where [he'd] just [seen his] wife. And the kids were standing there. [¶] And right when I got there she had brought Connor over, and so I - - right then I knew, okay, he was the one hit or something happened."

Appellant and his wife filed a lawsuit on behalf of themselves and Connor. Respondent moved for summary adjudication of appellant's cause of action for negligent infliction of emotional distress. The trial court granted the motion and entered judgment against appellant.[1]

DISCUSSION

We affirm the order granting summary adjudication of appellant's claim because he cannot establish that he was present at the scene of the injury-producing event at the time it occurred and was simultaneously aware that his son was being injured.

We review a court's ruling on summary adjudication de novo, "liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party." (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.) A trial court properly grants a motion for summary adjudication only if there are no issues of triable fact and the moving party is entitled to judgment as a matter of law on a particular cause of action, defense, claim or issue of duty. (Code Civ. Proc., § 437c, subds. (c) & (f).) It is the moving party's burden to demonstrate that the plaintiff has not established, and cannot reasonably expect to establish, a prima facie case. (*State of California, at p.* 1017.)

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[1] Respondent also moved for summary adjudication of the wife's cause of action for negligent infliction of emotional distress. The court denied that motion, and she is not a party to this appeal.

A cause of action for negligent infliction of emotional distress brought by a bystander requires proof that the plaintiff "(1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647.) Only the second requirement is challenged in the present case.

In *Thing,* a mother could not recover for the emotional injuries she suffered after her son was hit by a car. She was nearby and rushed to him as soon as she was told he had been hit, but she did not hear or see the accident and was not simultaneously aware that he was being injured. (*Thing v. La Chusa, supra,* 48 Cal.3d 644.) "Recovery is precluded when a plaintiff perceives an accident but is unaware of injury to a family member until minutes or even seconds later." (*Fife v. Astenius* (1991) 232 Cal.App.3d 1090, 1093.)

Appellant did hear the accident, but he did not simultaneously learn that it was his son who had been hit. Appellant first learned it was his son when he saw his wife pick his son up and place him on the side of the road. Appellant faces the same barrier to recovery that the plaintiffs faced in *Fife*. There, family members could not recover for emotional distress because they heard an auto accident behind their house and saw debris fly over the wall, but they did not learn that a family member had been injured until they got to the street and saw her there.

Appellant contends that this case is distinguishable from *Fife* because he was at the scene. His presence at the scene is not enough. In *Ra v. Superior Court* (2007) 154 Cal.App.4th 142, a wife could not recover for her emotional distress because she did not see a sign fall on her husband's head, although she was in the store with him when it happened, heard a loud sound, turned around and saw he had his hands to his head. Appellant cannot recover here for the same reason. He was 40 or 50 yards away when his son was hit, and he did not simultaneously realize it was his son.

Visual perception is not essential to recovery, but there must be some simultaneous sensory awareness that the family member has been injured. (*Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1271.) "[I]t is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child." (*Id.* at p. 1271,) In *Wilks*, a mother was in a house with her daughters when the house exploded. She knew, as she was blasted out the front door, that they would necessarily be hurt or killed although they were in adjacent rooms just before the blast and she did not see its impact on them. Here, appellant's own testimony establishes that he did not know that his son had been injured until moments after the accident when he saw his wife carry their son to the side of the road.

Appellant contends that triable issues of fact arise from his testimony that, while he was running toward the noise, he told the 9-1-1 operator that his son had been hit by a car. The record does not support the contention. Appellant did testify that he told the operator, "'My son's been hit," or "hit by a car. There's been an accident down here, you know . . . .'" But it was clear from his testimony that he did not say his son had been hit until he had seen his wife put their son down on the side of the road. He testified, "my wife had just picked up Connor and put him down on the side of the road right where I was. And at that - - right at that time I - - I had my phone as I [was] running, actually. I don't know if I knew what happened, but I - - I had dialed 9-11 . . . ." He was asked, "Did you know what had occurred when you picked up your phone or when you started calling 9-1-1?" Appellant answered, "Not exactly. I - - I don't think - - I mean I was running toward it, and something was happening . . . . [¶] As I was running and I saw Kacey bringing Connor over - - that's when I knew something had happened. And so that's why I called . . . ."

Absent any triable issue of fact, appellant cannot establish a prima facie case and respondent is entitled to judgment as a matter of law.

DISPOSITION

The judgment is affirmed. Costs to respondent

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COFFEE, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Teresa Estrada-Mullaney, Judge

Superior Court County of San Luis Obispo

Tardiff Law Offices, Neil S. Tardiff, for Plaintiff and Appellant Ryan P. Angle.

Hager & Dowling, Thomas J. Dowling, for Defendant and Respondent, James Barnett.